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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 633

PICKERING LUMBER CORPORATION
(a corporation),
Petitioner,

vs.

SOPHIA WHITESIDE, ROGER V. WHITESIDE, WILLIAM C. ROBINSON, and JOHN D. LAMONT, as Executors of the Last Will and Testament of Robert B. Whiteside, sometimes known as Robert B. Whitesides, sometimes known as R. B. Whiteside, Deceased,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA AND BRIEF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The facts of this case are exactly as stated in the opinion of the District Court of Appeal for the Third Appellate District of the State of California. This opinion is set forth in the Transcript of Record on file herein at pages 434 to 446, inclusive.

We rely upon this statement of facts of the District Court of Appeal. Under the practice in California if a party is of the opinion that the facts are incorrectly set forth in the opinion of a reviewing court, he may file a petition for rehearing and set forth his objections to the statement of facts. Petitioner herein did file such a petition for a rehearing by the District Court of Appeal, but, except for one ill-founded criticism which we will refer to later, no attempt was made therein to challenge the accuracy of the statement of facts made by that court. The petition for rehearing was denied.

Since the facts are fairly stated in the opinion of the court, there appears to be no reason for us to make a complete statement of facts herein. Some facts which the court did not deem essential to an understanding of its opinion were not set forth therein. Where necessary to meet the factual and legal arguments advanced by petitioner, we will refer to the Transcript of Record from time to time.

Due to the fragmentary nature of the purported statement of facts appearing in the petition, the omission of many material facts, and the distortion of certain facts and stipulations to meet the legal effect desired by peti-

tioner, a casual reading thereof gives an erroneous impression of what is involved in this case. It will, therefore, be necessary for us to refer to the record in order to correct the petitioner's statement of the case and the facts, which in many respects is not only inaccurate, but directly opposed to the facts set forth in the record.

I.

ERRORS IN PETITIONER'S STATEMENT OF THE NATURE OF THE CASE AND THE FACTS, AND ADDITIONS THERETO.

On page 6 of the petition it is asserted that "the Superior Court sustained petitioner's claim to title *and plea of res judicata* (R. 157, 161)". The record reference is to the judgment of the trial court, by which it was adjudged that petitioner herein was the owner in fee of the real property. Nothing in the judgment indicates that petitioner's plea of *res judicata* was sustained. Nor in the trial court's findings of fact and conclusions of law (R. 150-156) is there any finding one way or the other with reference to the plea of *res judicata*. So far as the record shows the plea of *res judicata* was not considered by the trial court.

On page 8 of the petition it is stated that the two assignments by Whiteside to the Duluth Bank of installments of the purchase price of the land and the instruments in connection therewith "assigned all of the rights conferred upon Whiteside by the purchase contract in so far as the same may be necessary or applicable to enforce payment by debtor of the entire unpaid balance of the purchase price". This, of course, was a part of the

"security transactions" referred to in the opinion of the District Court of Appeal. Legal title to neither the land nor the contract was transferred to the Duluth bank. The District Court of Appeal said with reference to these transactions that:

> "These were security transactions in so far as they affected the Pickering contract; *they did not transfer Whiteside's title. He held the title to the land as security for these payments.* This assignment, being a security transaction, created an equitable lien or mortgage on the Whiteside tract." (Authorities cited.)
>
> "These authorities clearly determine that *the effect of these transactions, in so far as Whiteside's land was concerned, was an equitable second mortgage on his land, held in trust by the bank. We must bear in mind that the bank owned the mortgage but not the land.* The Whiteside notes constituted the mortgage debt, and the land was Whiteside's security that Pickering Lumber Company would pay an amount sufficient to satisfy the Whiteside notes. . . . *Whiteside had the right to expect that if the bank required him to pay the notes, it would return his security*" (i. e.—the security he gave the bank) "consisting of the equitable second mortgage." (Parenthetical expressions and emphasis added.) (R. 440-441.)

On page 9 of the petition it is asserted that:

> "As the owner of $100,000 principal amount of the (Whiteside) notes the Duluth Bank filed claim in the bankruptcy proceedings upon $100,000 of the unpaid balance of the purchase contract, with interest (R. 174). . . . The Noteholders' Protective Committee, as holder of $200,000 principal amount of Whiteside notes, filed a claim in the bankruptcy proceedings upon $200,000 of the unpaid balance of the purchase contract (R. 174-5)."

The foregoing statements that these claims were filed "upon $100,000 of the unpaid balance of the purchase contract" and "upon $200,000 of the unpaid balance of the purchase contract" are not in accord with the record. The Stipulation of Facts, paragraph 13 (R. 174-175) shows that the four claims referred to in said paragraph 13 were filed *upon 5½% Gold Notes of Robert B. Whiteside.* The several claims themselves (Exhibits 11, 12, 13 and 14 to the Stipulation of Facts) (R. 241-264) are the best evidence that the claims were filed upon the Whiteside notes. It was also stipulated that Pickering Lumber Company was not indebted upon or obligated to pay the said notes of Robert B. Whiteside; and that no claims other than the four mentioned in paragraph 13 of the Stipulation of Facts were filed in the reorganization proceedings (R. 175).

Following the filing of the four claims against the debtor, the bankruptcy court made an "Order Allowing Claims as Classified and Disallowing Claims" (R. 291-293). It is of significance that in this order the court, after a hearing on the claims, allowed only the claim of First and American National Bank of Duluth, *"as owner, but not as trustee"*, in the amount of $100,000, and the claim of A. C. Weiss, Charles D. Brewer and Robert W. Hotchkiss, as a committee, existing under a noteholders' protective committee agreement, dated November 15, 1931, for $200,000.

By this order, which was final in character and binding upon both the bankrupt and the claimants named therein, the bankruptcy court recognized that the claims which it allowed were based upon the Whiteside notes. This was a judicial determination of the meaning of the Plan of

Reorganization to which reference will be made hereafter. The Duluth Bank was the owner of Whiteside notes of a face value of $100,000 and its claim (R. 243-245) as the owner of those notes was allowed. The claim alleged that those notes were *secured* by an agreement which assigned the sum of $100,000 due under the land contract between Whiteside and Pickering Lumber Company. The bank did not waive or release its security.

The claim of the Duluth Bank, as trustee (R. 241-243), was disallowed by the court because it recognized that the bank, *as trustee,* was not the owner of the notes described therein nor of the security for those notes. The security constituted a pledge in trust and the pledgee is not the legal owner of the pledged property.

Brewster v. Hartley, 37 Cal. 15, 99 A. Dec. 237;
1 *Bogert, Trusts and Trustees,* p. 155, Sec. 30;
California Civil Code, Secs. 2993, 2996, 2887;
Joint Pole Assn. v. Steele, 213 Cal. 233, 236, 2 Pac. (2d) 335;
Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250, 253.

Likewise for the same reasons the court disallowed the claim of the Duluth Bank, as trustee, based on Whiteside notes in an amount of $200,000, because those notes were in the hands of the Whiteside Noteholders Committee.

The statement of petitioner that these claims were filed upon the unpaid balance of the purchase contract cannot be sustained because neither the Duluth Bank, as an individual, nor the Whiteside Noteholders Protective Committee, had other than a beneficial interest in the security for the Whiteside notes. The security was in the con-

trol of the Duluth Bank, *as trustee.* The bank's claims, *as trustee,* were disallowed.

By allowing only the claims which the Whiteside noteholders personally filed on their notes, the bankruptcy court recognized that satisfaction of those notes was synonymous with performance of the contract for the reason that the amount due on the notes was exactly the same as the balance due under the land contract.

The Order Allowing and Disallowing Claims was entered by the bankruptcy court February 19, 1937 (R. 293), and on the same day the court, after making findings of fact, *inter alia,* that acceptances of said plan had been filed by the Duluth Bank, "as owner and holder of $100,000 principal amount of said 5½% Gold Notes", and by the members of the Noteholders Protective Committee "acting in behalf of the holders and owners of said 5½% Gold Notes in the aggregate principal amount of $200,000 (R. 298) "whose claims have been allowed and would be affected by the Plan" . . . (R. 300) made its order adjudging and decreeing that the plan of reorganization "is hereby in all respects confirmed" . . . (R. 301).

That said orders, of allowance and disallowance of claims, and confirming said plan, are adjudications that said plan of reorganization contemplated the satisfaction or discharge of the equitable mortgage lien and the indebtedness secured thereby, imposed upon the bankrupt and required by Whiteside, as equivalent satisfaction of the purchase contract.

In its Amended Answer to Cross-Complaint, Pickering Lumber Corporation admitted in response to allegations contained in paragraph XIX of the cross-complaint (R.

27), just as we contend, that "said plan of reorganization provided that the holders of said notes issued by Robert B. Whiteside . . . should receive, *in satisfaction of their allowed claims,* income bonds" and other securities described in the plan of reorganization (R. 125). Paragraph 8 of the bankruptcy court's final decree, however, directs that the securities

> "shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder." (R. 327, 331.)

The plan of reorganization contained no such provision as that set forth in the final decree. No mention was made of the Whiteside notes therein.

The obvious reason for this departure from the plan of reorganization is shown by the record. After the claims based on the Whiteside notes had been filed and allowed by the court, and just before the court had made its order confirming the plan (R. 293-308), pursuant to a petition dated February 11, 1937, the Probate Court of St. Louis County, Minnesota, on February 17, 1937, had made its "Order Instructing Representatives Relative to Delivery of Deed to Pickering Lumber Co." (R. 24-25). By this order the court authorized the delivery of the deed to the real property *upon condition of satisfaction of the claims filed against the Whiteside Estate by the Duluth Bank, as trustee, upon the Whiteside notes.* Certified copies of said order were served upon the bankrupt, its reorganization committee, and the Duluth Bank (R. 176-177; 24-25).

When the Duluth Bank became aware that it would be unable to accept the securities provided for it under the terms of the plan of reorganization, and still avail itself of its allowed claims against the Whiteside Estate based on the same notes, it attempted to exercise its rights as trustee and foreclose the pledged collateral and advertised the same for sale (R. 320). This is a further recognition of the fact that the Duluth Bank, as trustee, was not the assignee or legal owner of the land contract or the payments due thereunder.

In an endeavor to appease and placate the Duluth Bank, a shift of purpose was made in the reorganization plans. Neither the bank, as trustee, nor the adjudged holders of the allowed claims, were required to surrender or satisfy the Whiteside notes, but under the final decree the Duluth Bank was to hold the securities in lieu of the collateral represented by the payments due under the land contract. It is hard to believe that the bankruptcy court, or those engineering the reorganization, by their policy of appeasing the bank, intended to try and force the Whiteside Estate to contribute its property to the aggrandizement of the Pickering Lumber Company bondholders and stockholders. However, unless this premise is accepted, the only alternative is that the court intended to pass to the reorganized corporation the only interest in the property which the debtor had, to-wit, an equity under the contract of purchase, and leave the matter of acquiring title to the land to negotiation or litigation. Petitioner herein voluntarily chose litigation. It came to California and by filing suit to quiet title submitted to the jurisdiction of the California courts. That jurisdiction

has been exercised, the law has been properly applied, and the perpetration of a gross fraud upon respondents herein has been prevented.

We make this correction because of many misleading assertions of purported facts set forth in the petition, briefly, to the effect that the claims were filed on the Pickering contract, and that the Duluth Bank was the owner or assignee of the Pickering contract. The form of these claims, the negotiations between the Pickering Lumber Company Bondholders Committee and the Whiteside noteholders and the bank, the plan of reorganization, and other factors in the case, all combined to lead respondents herein to believe that it was the intention to satisfy and discharge all of the Whiteside notes in accordance with the plan of reorganization and order of the Probate Court of St. Louis County, Minnesota. The order of the probate court appears in the record at pages 24-25. This was not done, however; the bankruptcy court left the Whiteside notes unsatisfied and the Whiteside Estate with an unsatisfied judgment against it based on the Whiteside notes in an amount of $319,794.52 (R. 172). Interest on this judgment has been accruing ever since March 6, 1933.

That it was the manifest intention to satisfy the Whiteside notes is made clear by a consideration of the negotions which resulted in the plan of reorganization. These negotiations, looking toward the satisfaction of the Whiteside notes, were opened by Pickering Bondholders Committee (which Committee proposed the plan of reorganization), through E. C. Cronwall, a member thereof, with the Whiteside Noteholders Committee. Through these

negotiations he proposed giving "preferred stock of the reorganized Pickering Lumber Company *par for par* for the $300,000 Whiteside notes, and in addition they were to receive 3,000 shares of the common stock" (R. 366).

That proposal being unacceptable, Cronwall attended a meeting with the Whiteside Noteholders Committee at Duluth, Minnesota, on May 6, 1936, and suggested that they make a counter proposal, as what his committee "were interested in was to see about the best deal that could be made in the interest of the Pickering bondholders *to take care of the Whiteside notes* . . . We realize that to satisfy the first mortgage which the Bondholders Protective Committee owned, and to pay up the balance due on the Whiteside tract, would result in acquiring the deed and the title to the timber" (R. 385).

On May 6, 1936, Whiteside Noteholders Committee and the Duluth Bank, as the holders of the Whiteside notes, submitted their counter proposal, in writing, addressed to Pickering Lumber Company Bondholders Committee, by which they agreed to accept certain stocks, plus certain bonds, and "release the above mentioned claim against the Pickering Lumber Company", and deliver the deed to the lands which at the time of the execution of the purchase contract had been put in escrow with the Duluth Bank to be delivered by it only upon full payment of the purchase price, with interest (R. 19-20; 39). The executors of the Whiteside Estate consented to the above agreement, *subject to the approval of the Probate Court of St. Louis County, Minnesota* (R. 20).

On page 10 of the petition reference is made to pages 52 and 53 of the record and it is said that under the

subheading "Creditors Holding Junior Liens" in the plan of reorganization, there was described the unpaid balance on the purchase contract in the principal amount of $300,000, together with accrued interest to December 1, 1934, in the sum of $52,250. This statement is directly contrary to the record. The plan of reorganization described the Whiteside notes as liabilities of the debtor. We quote the record (R. 53):

> "II. Creditors holding junior liens.
>
> C. *Claims arising on notes of R. B. Whiteside and Sophia Whiteside, his wife,* secured by purchase money contract.....$300,000.00
>
> Accrued interest to December 1, 1934 ..... 52,250.00"

On page 11 of the petition it is alleged that the bonds and stocks issued by petitioner as prescribed by the plan were distributed to the Duluth Bank and the Noteholders' Committee *in satisfaction of claims for the entire unpaid balance on the purchase contract.* Reference is made to the Stipulation of Facts, page 181 of the record. Paragraph 24 of the Stipulation of Facts is not subject to the construction attempted to be placed thereon by petitioner. As we have heretofore pointed out the plan contemplated the satisfaction of the Whiteside notes. It was stipulated (R. 181) that when these securities were delivered, the bank, as trustee, did not deliver to Pickering Lumber Corporation any of Whiteside's 5½% notes. If they had been delivered up for cancellation as was contemplated, this litigation would never have been instituted. Such action was taken with reference to Mr.

Whiteside's notes which were secured by a first mortgage held by Detroit Trust Company (R. 182).

In discussing the meaning of the plan of reorganization, it is important to note that not only do the Pickering Lumber Company bondholders retain an interest in Pickering Lumber Corporation, *but the Pickering Lumber Company stockholders also retain an interest therein.* Before either the Pickering Lumber Company bondholders or the Pickering Lumber Company stockholders could derivatively (through the contract of Pickering Lumber Company) acquire any rights in the Whiteside tract to the exclusion of the Whiteside Estate, the Whiteside Estate was entitled to full and complete compensation for that tract in accordance with the terms of the contract. In the instant case complete compensation could be made only by satisfying Whiteside's notes of 1925 and 1928, or paying the price. Any reorganization which would seek to take the Whiteside tract from the Whiteside Estate without rendering that full and absolute compensation and yet would seek to preserve to bondholders and stockholders an interest in the reorganized company would be a gross fraud, subject to judicial denunciation, unenforceable in a court of law or equity, and in contravention of constitutional principles of due process.

The plan of reorganization, if construed as Pickering Lumber Corporation now contends, would provide for just that sort of fraud. Hence the plan cannot be so construed, for it is a cardinal canon of construction that "A contract must receive such an interpretation as will make it lawful".

California Civil Code, Sec. 1643;

6 *Cal. Jur.* 268, Sec. 168;

12 *Am. Jur.* 793-794, Sec. 251;
6 *R. C. L.* 839, Sec. 229;
17 *C. J. S.* pp. 735-744, Secs. 318-320.

The fraud involved in the construction of the plan which Pickering Lumber Corporation now seeks to force upon the Whiteside Estate is again considered in the recent case of *Consolidated Rock Products Co. v. Du Bois,* 312 U. S. 510, 85 L. Ed. 982, 61 S. Ct. 675, which once more recognizes

> "The full and absolute priority rule of Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. Ed. 931, 33 S. Ct. 554, and Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 84 L. Ed. 110, 60 S. Ct. 1, 41 Am. Bankr. Rep. (N. S.) 110."

The "absolute priority rule" was applied in those decisions to insure that stockholders received nothing until bondholders or other creditors were fully provided for.

A conditional vendor of a bankrupt corporation undergoing reorganization when his contract is not rejected occupies a position prior to both bondholders and stockholders of the bankrupt corporation, for the property contracted to be sold is the vendor's until the full purchase price is paid.

The "absolute priority rule", as applied to this case, simply means that the Whiteside Estate was entitled to everything that Whiteside contracted for before the land could be taken into the reorganization. The plan of reorganization proposed to give the Whiteside Estate what Whiteside had contracted for by accomplishing the satisfaction and discharge of Whiteside's notes of 1925 and 1928. This was no more than was equitable.

WITH REFERENCE TO THE INTERVENTION OF RESPONDENTS IN THE BANKRUPTCY PROCEEDINGS.

On page 12 petitioner has asserted that on March 13, 1937, respondents appeared *generally* and filed an intervening petition in the bankruptcy proceedings. The petition was filed by leave of the court first had and obtained. The parties named therein were:

> "Sophia Whiteside, Roger V. Whiteside, William C. Robinson and John D. Lamont, Executors of the Last Will and Testament of R. B. Whiteside, Deceased,
>
> Interveners,
>
> VS.
>
> First and American National Bank of Duluth, A. C. Weiss, Charles D. Brewer, and Robert W. Hotchkiss,
>
> Respondents." (R. 310.)

In the intervening petition the facts relative to the filing of claims against the debtor, Pickering Lumber Company, based on the Whiteside notes by the Duluth Bank and the Whiteside Noteholders Protective Committee were alleged. (R. 316). The allowance of those claims by the bankruptcy court, and the listing of those claims on Whiteside's notes in the plan of reorganization were also alleged (R. 317). The making of an order by the Probate Court of St. Louis County, Minnesota, in which court the Whiteside Estate was being probated, setting forth the terms upon which the deed to the real property in question might be delivered, and the apparent intention of the Duluth Bank, as trustee, to refuse to carry out the terms of the plan of reorganization and the order of the probate court, were also alleged (R. 318-320). No claim was asserted by respondents herein against Pick-

ering Lumber Company, the debtor, nor against any of its assets or property. The only persons participating in the hearing on March 17, 1937, were the interveners and the respondents named in the intervening petition (R. 326-327). Respondent therein, Duluth Bank, as trustee, was ordered to withdraw and discontinue its notices of sales under the collateral trust agreements, and the court reserved jurisdiction to hear and determine in so far as it had jurisdiction all matters and things set forth in the petition at the time of the hearing upon the final decree *or at such other time as the court might fix* (R. 327).

The intervening petition was further heard by the court on March 26, 1937, as stated by the District Court of Appeal in its opinion, only the Whiteside Executors and the Duluth Bank and the members of the Whiteside Noteholders Committee participating as parties (R. 332-333). *On March 27, 1937, the court signed an order dismissing the intervening petition without prejudice to the rights of said interveners and said respondents with respect to the matters and things alleged in said intervening petition* (R. 333).

On March 27, 1937, the final decree in the reorganization proceeding was also signed. This decree required the Duluth Bank to deliver the deed (held by it in escrow under the terms of the contract of sale) to Pickering Lumber Corporation, when organized, and to hold the securities provided in the plan of reorganization in lieu of the collateral represented by the contract dated January 5, 1927, and the payments due thereunder (R. 331).

While it was stipulated between the parties herein that the hearing on the final decree and the hearing which

resulted in the order on the intervening petition were heard together by said court and said order and said final decree were entered simultaneously (R. 180), an examination of the recitals in said order on the intervening petition shows that that matter was heard on March 26, 1937, and dated March 27, 1937 (R. 332-333). The recitals in the final decree show that the hearing thereon was held on the same day it bears date, to-wit, March 27, 1937 (R. 331).

II.

PETITIONER'S STATEMENT OF GROUNDS UPON WHICH IT IS CLAIMED QUESTIONS INVOLVED ARE SUBSTANTIAL.

In the petition, pages 26 to 28, petitioner claims the questions asserted by it to be involved here are of paramount public importance, and manifests a groundless concern that the questions litigated in the bankruptcy court must be relitigated at the instance of any creditor or stockholder. Fear is also expressed that if a state court is held to have the right to protect the owner of land against assertions of title thereto by a reorganized corporation that the objectives of Congress in enacting the statute to rehabilitate debtors by freeing them from burdensome obligations will be frustrated.

We believe that the eyes of this court will be keen to discern that this reorganized corporation is not so concerned with being relieved of burdensome obligations as it is with the probability that it may not be permitted to gain title unjustly to this valuable property without performing the obligation which Pickering Lumber Company

agreed to perform when it made its contract to purchase the land in 1927.

The debtor and those who were manipulating the reorganization proceedings were careful at all times to see that this purchase contract was not rejected by the bankruptcy court neither in plan or decree. If the debtor desired to be relieved of the conditions of the contract relating to the purchase price, the court undoubtedly could have been prevailed upon to reject the contract and the debtor would have been freed from personal liability.

Petitioner while stressing its alleged rights under the Bankruptcy Act fails to recognize that if its claims were sustained, the rights of respondents arising under the due process clause of the United States Constitution would most certainly be impaired.

The bankruptcy power, like other great substantive powers of Congress, is subject to the due process clause of the Constitution of the United States.

> *Louisville Joint Stock Land Bank v. Bradford,* 295 U. S. 555, 79 L. Ed. 1593-1604, 55 S. Ct. 854;
> *In re Tennessee Publishing Company,* 81 Fed. (2d) 463, affirmed on other grounds in 299 U. S. 18, 81 L. Ed. 13, 57 S. Ct. 85.

Respondents in their "Further Amendment To Answer To Complaint to Quiet Title to Real Property and Cross-Complaint" (R. 87-88) specifically pleaded that if the construction contended for by petitioner herein were to be given to the final decree or to Section 77B of the Bankruptcy Act such construction would deprive respondents of their property without due process, and this

proposition was urged upon each of the courts of the State of California. The trial court ignored respondents' plea, but the District Court of Appeal, recognizing that the Constitution of the United States is paramount, held that the bankruptcy court could not, and did not, adjudicate the property rights of respondents since they were not parties to the proceedings.

This holding is in full accord with many decisions of this court, and of the Supreme Court of California, which are cited in a later portion of this reply.

III.

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Under Rule 7 of the Rules of the Supreme Court, subdivision 3, no motion by respondent to dismiss a petition for writ of certiorari will be received. However, this rule permits objections to the jurisdiction of this court to grant a writ of certiorari to be included in the brief of respondent in opposition thereto. Accordingly respondents here respectfully present their objections to the jurisdiction of this court to grant the writ prayed for by petitioner as follows:

1. The decision of the District Court of Appeal was based upon local law of the State of California relating to real property located therein.

2. No substantial federal question is involved since Section 77B of the Bankruptcy Act does not purport by its terms to grant title to property owned by the Whiteside Estate to Pickering Lumber Company or to its successor in interest, the petitioner herein, nor does the final decree of the bankruptcy court made in the reorganization proceedings of Pickering Lumber Company purport to transfer title from the Whiteside Estate to said debtor or its successor.

3. The plea of *res judicata* is sham.

4. Although the District Court of Appeal did determine in its opinion that the debtor did not acquire title to the real property in question by virtue of the provisions of the final decree and that anything adjudged in that decree was not *res judicata* as to respondents herein, such determination was not required since the decision is properly grounded on a non-Federal ground.

A. THE AUTHORITIES IN SUPPORT OF THIS PROPOSITION.

A petition for writ of certiorari to review a judgment of a state court will be denied if that judgment rests upon a non-Federal ground adequate to support it.

City of New York v. Central Savings Bank, 306 U. S. 661, 83 L. Ed. 1058, 59 S. Ct. 790;

Lynch v. New York, 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16.

The Federal Supreme Court will not take jurisdiction of a writ of error to a state court whose judgment rests on a non-Federal ground adequate to support it. Under

such circumstances the existence of a Federal question is of no significance.

Bilby v. Stewart, 246 U. S. 255, 62 L. Ed. 701, 38 S. Ct. 264;

Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 61 L. Ed. 1153, 37 S. Ct. 643;

Scott v. Kelly, 89 U. S. 57, 22 L. Ed. 729;

Farson, Son & Company v. Bird, 248 U. S. 268, 63 L. Ed. 233, 39 S. Ct. 111;

Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72, 16 S. Ct. 939.

Where the judgment of a state court rests upon two grounds one of which is Federal and the other non-Federal in character, the Supreme Court of the United States is without jurisdiction to review if the non-Federal ground is independent of the Federal ground and adequate to support the judgment.

Fox Film Corporation v. Muller, 296 U. S. 207, 80 L. Ed. 158;

Klinger v. Missouri, 13 Wall. 257, 263, 20 L. Ed. 635, 637;

Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 163-165, 61 L. Ed. 644, 648, 649, 37 S. Ct. 318;

Petrie v. Nampa & M. Irrig. Dist., 248 U. S. 154, 157, 63 L. Ed. 178, 179, 39 S. Ct. 25;

McCoy v. Shaw, 277 U. S. 302, 72 L. Ed. 891, 48 S. Ct. 519;

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131.

The case of *Scott v. Kelly,* 89 U. S. 57, 22 L. Ed. 729, appears to be particularly applicable to the facts of the case at bar. It involved a question of ownership of certain funds in the hands of garnishees which funds were claimed by Kelly, as Sheriff, and by assignees in bankruptcy. This court there dismissed the writs of error for want of jurisdiction, saying:

> "The assignees in bankruptcy voluntarily submitted themselves and their rights to the jurisdiction of the State Court. Being summoned, they appeared, without objection, and presented their claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the State Court to act in the premises and render judgment. Mays v. Fritton (ante, 389).
>
> The question presented for the decision of the State Court was not whether, if the bankrupt had title, it would pass to his assignees by the operation of the Bankruptcy Act, but whether he had title at all. The court decided that he had not. Such a decision by a State Court does not present a question of which this Court can take jurisdiction upon a writ of error."

Title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. The decisions in support of the above proposition are legion. We cite the following decisions of this court in support thereof.

United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287;
Clark v. Graham, 6 Wheat. 577, 5 L. Ed. 334;
Kerr v. Moon, 9 Wheat. 565, 6 L. Ed. 161, 163;
McCormick v. Sullivant, 10 Wheat. 192, 202, 6 L. Ed. 300, 303;

Taylor v. Benham, 5 How. 233, 273, 12 L. Ed. 130, 149;

McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545;

Brine v. Insurance Co., 96 U. S. 627, 639, 24 L. Ed. 858, 861;

Schley v. Pullman Co., 120 U. S. 575, 580, 30 L. Ed. 789, 790, 791, 7 S. Ct. 730.

1. **The decision of the District Court of Appeal was based upon local law of the State of California relating to real property located therein.**

Petitioner (plaintiff and respondent in the courts of California) claimed title to the land in question under several conflicting theories. First, in its complaint filed May 27, 1937, it alleged:

> "Plaintiff above named is now and by its predecessors in title has been, *for many years last past* and immediately preceding the commencement of this action, the sole owner in fee simple absolute and in possession of all those certain pieces, parcels and lots of land . . ." (R. 2.)

Second, in its Reply to Answer and Answer to Cross-Complaint petitioner herein alleged:

> ". . . alleges that *plaintiff claims title under said deed*" (the deed which was executed by Robert B. Whiteside and Sophia Whiteside, his wife and placed in escrow with The First National Bank of Duluth and thereafter delivered to plaintiff by First and American National Bank of Duluth, as successor of The First National Bank of Duluth) "*and likewise claims title under a written contract* made and entered into by Robert B. Whiteside, Sophia Whiteside, his wife, and Pickering Lumber Company, dated January 5, 1927, . . ." (R. 90.)

> ". . . plaintiff alleges that said written agreement dated January 5, 1927, was an executed conveyance of the real estate described therein, the same being the real estate described in plaintiff's complaint, that by said written agreement Robert B. Whiteside and Sophia Whiteside conveyed all of their right, title and interest in and to said real estate to Pickering Lumber Company, subject only to the first mortgage hereinabove mentioned; that when said written agreement was made and entered into it was the intent of Robert B. Whiteside and Sophia Whiteside, his wife, and of Pickering Lumber Company that said written agreement should convey title to all of said real estate therein described (the same being also described in Plaintiff's Complaint) to Pickering Lumber Company, and said instrument did convey the title to said real estate to Pickering Lumber Company, subject only to said first mortgage." (R. 92.)

Further allegations of title by the written agreement of January 5, 1927, are also contained in said reply to Answer and Answer to Cross-Complaint (R. 94, 95), and it was alleged that Robert B. Whiteside and wife did not reserve the title but only reserved a lien upon the real estate to secure the unpaid balance of purchase price.

Third, petitioner herein alleged it claimed title by virtue of the bankruptcy proceeding of the Pickering Lumber Company (R. 90).

Fourth, petitioner herein alleged that by the final decree in the bankruptcy proceedings it was "finally adjudicated that the defendants have no right, title or interest in, to or against any of the property of this plaintiff or any of the property of Pickering Lumber Company, and that defendants have no claim or demand against this plaintiff

or any of its property, and the defendants are by said decree estopped to claim and enjoined from claiming any right, title or interest in or to the property described in plaintiff's complaint" (R. 127).

(a) The District Court of Appeal held that plaintiff's predecessor, Pickering Lumber Company, did not gain title by virtue of the contract of sale of January 5, 1927, saying:

> "With this contention of plaintiff we cannot agree. It is very plain that the contract was an executory contract of sale, and that title remained in the vendor. The language of the contract permits of no other construction. . . . After the execution of this contract, Whiteside still held title, subject to the first mortgage of the Detroit Trust Company" (R. 439-440).

This decision was based upon the law of California. The court said in its opinion:

> ". . . any contract affecting title to real property situated in California is to be construed according to the laws of California" (R. 443).

(b) The District Court of Appeal held that plaintiff (petitioner herein) failed to gain title by virtue of the deed which had been deposited in escrow with the Duluth Bank and which it was authorized to deliver only upon full payment of the purchase price of the Whiteside tract according to the contract of January 5, 1927, saying:

> "These were security transactions insofar as they affected the Pickering Contract; they did not transfer Whiteside's title. He held the title to the land as security for these payments. This assignment, being a security transaction, created an equitable lien or

mortgage on the Whiteside tract. . . . We must bear in mind that the bank owned the mortgage but not the land." (R. 440.)

"Who were the parties to the compromise plan or purported accord and satisfaction? *The Whiteside estate was not a party thereto,* because its acceptance thereof was conditional upon full satisfaction of the Whiteside note obligations, which condition was never complied with. . . . *We believe that the attempt of the bank to pass title to land it did not own was futile, as was the attempt to separate the mortgage from the mortgage debt.* . . . Under these circumstances the mortgage debt and mortgage cannot be separated. The fact that the land may have been of little or no value above the encumbrance did not give the parties the right to compromise and to transfer title to this land in the making of the accord and satisfaction. The owner of the land, no matter what its value, cannot be deprived of his property without due process, and the law has established the procedure which must be followed." (R. 441-442.)

This decision that the act of the Duluth Bank in delivering the escrowed deed did not operate to transfer title to the California land is based on the law of California. The court held that since the Whiteside Estate did not agree to the accord and satisfaction except upon conditions which were not observed, the Duluth Bank had no authority to deliver the deed or pass title to the land, because by so doing it would constitute an attempt to separate the mortgage debt (Whiteside's notes) from the mortgage (the equitable mortgage on the land) contrary to the law of California.

No Federal question was involved in the determination by the District Court of Appeal that Pickering Lumber

Company, and its successor in interest, petitioner herein, did not acquire title by reason of the claims hereinbefore referred to. The decision was based on California real property law alone, and the grounds thereof are adequate to support the judgment.

2. **No substantial Federal question is involved since Section 77B of the Bankruptcy Act does not purport by its terms to grant title to property owned by the Whiteside Estate to Pickering Lumber Company or to its successors in interest, nor does the final decree of the bankruptcy court purport to transfer title from the Whiteside Estate to said debtor or its successor.**

The third and fourth grounds of title claimed by petitioner were based on the bankruptcy proceedings of the Pickering Lumber Company, and the final decree entered therein.

All of the papers filed in the reorganization proceedings recognized that the bankrupt did not have the legal title to the real property here involved. The plan of reorganization is conclusive on that question. That plan proposed the acquisition of the escrowed deed by the satisfaction of Whiteside's notes as we have heretofore shown in an earlier part of this reply.

In 1934 when Pickering Lumber Company filed its petition under Section 77B of the Bankruptcy Act, as amended, for corporate reorganization, it did not claim to be the legal owner of the real property in question. The allegation of the petition is:

> "Your petitioner is obligated under a contract entered into with R. B. Whiteside and Sophia Whiteside, his wife, dated January 5, 1927, for the purchase of tracts of timber, on which contract there is now due and owing by your petitioner the sum of $600,-

000.00, together with unpaid interest thereon in the sum of $98,750.00." (R. 215.)

In the plan of reorganization dated November 1, 1936, which was filed in the bankruptcy court, these securities, debts, and interests dealt with in the reorganization were described as follows (R. 52-53):

"B. Claim arising on first mortgage notes of R. B. Whiteside and Sophia Whiteside, his wife..... $300,000.00
Accrued interest to December 1, 1934 ..... 52,500.00

II. Creditors Holding Junior Liens.

C. Claims arising on notes of R. B. Whiteside and Sophia Whiteside, his wife, secured by purchase money contract..... 300,000.00
Accrued interest to December 1, 1934 ..... 52,250.00"

In the same plan, under the heading "Property of the Reorganized Company", the following appears:

"The Reorganized Company would acquire all of the property *now owned* by the lumber company, free and clear of all liens of any kind or nature, except real estate and personal property taxes which, at the time of the transfer, are a specific lien on said property, . . ." (R. 56.)

Of course, at the time of the filing of the plan of reorganization it was admitted therein that it did not have title to the Whiteside tract.

Under Section D of the Plan, under the heading, "Distribution of New Securities", appears the following:

"D. Claim Arising on First Mortgage Notes of R. B. Whiteside and Sophia Whiteside:

The payment of this note in the sum of $300,000.00, plus interest was assumed by the Company at the time it contracted to acquire the valuable Whiteside timber lands. This note, plus accrued interest to December 1, 1934, amounting to $52,500.00, has heretofore been purchased by the Bondholders' Committee for the sum of $195,000.00, plus certain carrying charges and the amount of accrued taxes, making a total sum of $227,556.25. To make this purchase, the Bondholders' Committee made a loan bearing interest at the rate of 3½% per annum, secured by the pledge of this note. This obligation of the Bondholders' Committee will be paid, the Whiteside First Mortgage Note will be cancelled, and the mortgage released of record.

II. Creditors Holding Junior Liens.

C. Claim arising on the Notes of R. B. Whiteside:

These notes were made subsequent to the execution of the contract by which the Company agreed to purchase the Whiteside tract and are secured by a pledge of said contract. The holders of these notes will receive Income Bonds, Series 'B', in the sum of $105,000, 1950 shares of Convertible Preferred Stock, and 3,000 shares of Common Stock and will transfer title to the Whiteside tract to the Reorganized Company." (R. 63-64.)

There are other references in the record which likewise show that all persons interested in the reorganization proceedings of Pickering Lumber Company recognized that title to the Whiteside land was vested in the Whiteside Estate.

From the order confirming the plan of reorganization made by the bankruptcy court, it appears (R. 293, 301):

> "That all of the *property and assets of the debtor,* of every kind and character, and wheresoever situated, constitute the property which is dealt with by the Plan of Reorganization".

The contract to purchase the land was an asset of the debtor; the land itself was not the property of the debtor. Hence the plan did not deal with it.

Paragraph 8 of the bankruptcy court's final decree does not purport to adjudicate anything concerning the rights of the Whiteside Estate. That paragraph upon which petitioner relies for his entire contention of *res adjudicata* reads as follows:

> "8th: That First and American National Bank of Duluth shall deliver to Pickering Lumber Corporation, when organized, the deed held by it in escrow under the agreement between R. B. Whiteside and Sophia Whiteside and the debtor dated January 5, 1927, and the securities to be issued as provided in said Plan of Reorganization in exchange for said deed shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder." (R. 327, 331.)

The above paragraph from the final decree mentions neither the Whiteside Estate, nor the executors thereof. Nor does it purport to adjudicate their rights in the property in any respect. It simply provides for a manual exchange at an indefinite date in futuro of a physical object then in existence (the deed) for other physical

objects not then in existence (Pickering Lumber Corporation's securities). One of the parties to the future exchange was the corporation in physical possession of the deed, First and American National Bank of Duluth. The other party, Pickering Lumber Corporation, was not in existence.

Paragraph 8 in no wise declares that the Whiteside Estate will be divested of title to the Whiteside tract when the exchange takes place. To attribute such an effect to the decree would be to assert that the court was determining the legal effect of acts and deeds not yet performed so as to bind persons not before the court.

The assertion of title by petitioner based upon the final decree which does not even purport to adjudicate title fails to present more than a pretense of a federal question. Certainly it fails to present a substantial federal question worthy of the attention of this court.

The effect of such transfer was designedly left for determination by the courts of the State of California where the property is located. Such must have been the understanding of petitioner herein; otherwise, why was this suit to quiet title to the land so promptly brought in Tuolumne County, California?

Petitioner asserts that the bankruptcy court had jurisdiction over the real estate since the debtor was in possession of the property, and hence *could* adjudicate title thereto. There is no point in arguing over the question of whether the court could adjudicate title. The fact is that it did not attempt to do so.

Thompson v. Magnolia Petroleum Co., 309 U. S. 478, is cited in support of its contention. That case, how-

ever, involved a case where there was a real controversy between the parties as to the ownership of the fee. The bankruptcy court ordered the proceeds of the oil underlying the property to be impounded and held for the account of the rightful owner as might thereafter be determined by the bankruptcy court. This court approved the conservation measures ordered by the lower court, *but directed that the question of fee simple ownership of the land be submitted to the courts of the State of Illinois,* saying:

> "Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme."

In the *Thompson* case the bankruptcy court did not make any attempt to adjudicate who was the owner of the land, although there the parties to the action were each actively claiming ownership of the fee.

In the case at bar no controversy arose in the bankruptcy court between the debtor and any other person, firm, or corporation concerning the legal ownership of the land in question. The fact that the Whiteside Estate was the legal owner of the property was recognized at every stage of the proceedings. Indeed, petitioner, by taking the position that the court acquired jurisdiction over the real property by virtue of the possession thereof by the debtor, must admit that the legal ownership was vested in the Whiteside Estate.

Under the contract of purchase, the debtor was entitled to the possession of the land and was constructively in possession thereof. No attempt was made by anyone during the reorganization proceedings to interfere with that constructive possession. There was no need for the Whiteside Estate to make any claim for possession since there had been no cutting of the timber (R. 403), and since the contract of sale provided that no timber should be cut or removed without the consent of the seller while the purchaser was in default as to any of the covenants, agreements, or conditions of the contract (R. 32, 37). Hence, the possessory powers of the bankruptcy court were never invoked or exercised with respect to the property.

A reorganization court does not operate *in rem* upon property in possession of the debtor in the sense of adjudicating its ownership as against the world regardless of the subjection to the jurisdiction of the court of persons affected by the court's decree. The reorganization court deals only with the property and debts of the debtor. It is not a part of its function to change the ownership of property. The reorganized company takes only the title of its predecessor. While a reorganization court may require persons to litigate therein or in the state courts the question of the ownership of property in the possession of the debtor, no such action was taken by the court in the case at bar for the obvious reason that the ownership and legal title of respondents herein was conceded throughout the reorganization proceedings.

An owner of property may bring an appropriate action to recover possession of his property against the reor-

ganized corporation. Such a proceeding is not a collateral attack on orders of the reorganization court for the orders of such a court deal only with the interest of the debtor in the property.

Finletter, The Law of Bankruptcy Reorganization (1939 Ed.), pp. 675-679.

Under the bankruptcy power Congress may impair or destroy the obligation of contracts. But there is a significant difference between property rights and a mere debtor-creditor relation. Exercise of the bankruptcy power does not permit the destruction of property rights. An attempt to do so is an attempt to violate the Fifth Amendment to the Federal Constitution.

Ginsberg v. Lindel, 107 F. (2d) 721, 726 (C. C. A. 8).

Under Section 77B of the Bankruptcy Act jurisdiction is given to the bankruptcy court to "deal with all or any part of the property of the debtor". It also provides that the property dealt with by the plan (i. e., the property of the debtor) when transferred and conveyed by the trustee or trustees to the reorganized corporation shall be free and clear of all claims of the debtor, its stockholders and creditors.

No jurisdiction is given by the Act to deal, transfer or convey to the reorganized corporation property belonging to a person other than the debtor.

Any attempt by the court to deal with property of a third person is beyond its jurisdiction, and a judgment, decree or order of the court purporting to deal with or convey title to property not owned by the debtor is, in so far as it relates to that property, a nullity and void. Such an act is in contravention of its authority.

The foregoing principle was clearly enunciated in the case of *Vallely v. Northern Fire & Marine Insurance Co.*, 254 U. S. 348, 65 L. Ed. 297, 41 S. Ct. 116, where it appeared from the averments of a petition in involuntary bankruptcy that the person proceeded against was an insurance corporation. The Bankruptcy Act in effect at the time provided that any moneyed, business or commercial corporation, *except* a municipal, railroad, *insurance,* or banking corporation might be adjudged an involuntary bankrupt upon default or an impartial trial. Process was duly issued and served upon the insurance corporation, and default being made, an order of adjudication was entered. Upon motion, after the time for appeal had expired, the company moved to vacate the adjudication upon the ground it was null and void since it was an insurance company, not covered by the Bankruptcy Act, and that the court was without jurisdiction. The motion was granted. This court upheld the decision, saying:

> "For a court to extend the act to corporations of either kind" (that is, corporations of the excepted class) "is to enact a law, not to execute one."

The bankruptcy court, if it attempted to deal with the property of these respondents as contended by petitioner herein, it being admitted at and by every step in the bankruptcy proceedings that title was in the Whiteside Estate, or to pass title to their land by the expedient of ordering a party to the proceedings to deliver an escrowed deed contrary to the terms of the escrow to the reorganized corporation, was acting in excess of its statutory jurisdiction, and was enacting a new law, not executing the existing law. To give effect to a judgment

or decree under such circumstances would be to deprive respondents of their property without due or any process of law in contravention of the United States Constitution, as was alleged and urged by respondents before the courts of California.

Noble v. Union River Logging Railroad Co., 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271.

The case of *Stoll v. Gottlieb*, 305 U. S. 165, relied upon by petitioner is clearly not in point. The facts of that case as stated by this court show that Gottlieb was a bondholder of a bankrupt corporation; in other words he was a creditor of that corporation, holding a claim against it. He filed a petition asking that the court vacate its decree confirming the plan of reorganization on the ground of the court's lack of jurisdiction. His petition was denied, and he did not appeal from any of the bankruptcy orders. It was held that the order confirming the plan of reorganization was binding upon him, and since thereunder, a guaranty of the bonds held by him had been released, he was powerless to enforce the guaranty in the state courts of Illinois. There was no question that Gottlieb was a party and he asserted and litigated the jurisdiction of the court to release the guarantors on his bonds. The court adjudged its jurisdiction to release the guaranty existed, and although Gottlieb had the right to appeal, he did not do so.

The mere statement of these facts show the inapplicability of the decision to the facts of the case at bar, where respondents were not creditors of the debtor *but the owners of real property,* and hence not subject to the jurisdiction of the court; where they filed no claims against

the debtor and were not parties to the proceedings; where every act taken and order made recognized the ownership of the land was in them; and where no controversy arose or trial of any kind was had with reference to such ownership.

This court specifically stated in its opinion in the *Stoll* case that:

> "To appraise the cases dealing with status and *transfer of title to real estate* seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and *real estate titles.*"

The case of *Jackson v. Irving Trust Company,* 311 U. S. 494, contains beautiful abstract language about the opportunity to litigate questions, but that case, too, is inapposite. There, there were adversary parties to an action based upon pleadings setting forth the claims of both sides, a trial, a right of appeal, and a determination of a contested matter of jurisdiction.

Petitioner's final plea, based upon these cases, is that respondents had the opportunity to have its title to the land adjudicated, and that therefore it was bound by the decree. Respondents were strangers to the proceedings; no action was contemplated by the plan of reorganization which would have harmed their interests if carried out according to the plan; they were not brought into the proceedings in either a summary or plenary proceeding in an effort to challenge their legal title. Just why should they voluntarily make an issue where none existed and submit themselves to the jurisdiction of that court? The

cases we will hereafter cite relating to the rights of conditional vendors of property justify them in their reliance upon that title.

3. The plea of res judicata is sham.

In the preceding pages we have shown that the bankruptcy court did not adjudge anything with respect to the title of the real property nor attempt to make an adjudication of any fact against respondents herein. Hence, the claim that the final decree of the bankruptcy court was *res judicata* of the issues presented in the quiet title action in California is sham, and need not have been decided by the District Court of Appeal.

We will nevertheless here show without prejudice to the above entitled proposition that the court did not have jurisdiction over respondents herein since they were not parties to the bankruptcy proceedings, and that, whatever the purported effect of the decree upon the title to the property, if any, the decree was not binding upon these respondents.

(a) The Whiteside executors were not parties to the bankruptcy proceeding nor was the Whiteside Estate a creditor required to file a claim in the bankruptcy court.

No claim was ever filed against Pickering Lumber Company by or on behalf of the Whiteside Estate for the balance due under the conditional sale contract of 1927 (R. 175). It is an admitted fact that the Whiteside executors refused to accept any plan of reorganization which would leave the Whiteside notes of 1928 outstanding or which did not provide for the satisfaction of the judgment against the Whiteside Estate in favor of the Whiteside

noteholders based upon their allowed claims against the Whiteside Estate (R. 24-25; 176-177). The amended answer to cross-complaint filed by petitioner herein contains the following allegation:

> "the defendants, as executors of the last will and testament of Robert B. Whiteside, refused to file a written acceptance of said plan of reorganization or to give their consent to compliance by First and American National Bank of Duluth, as trustee, with the provisions of said plan of reorganization." (R. 128.)

By a long line of Federal court decisions it has been determined in the case of conditional sale contracts that property in possession of a bankrupt conditional vendee who invokes Section 77B of the Bankruptcy Act is the property of the conditional vendor; and that neither passage nor application of Section 77B can divest the title of the vendor; and that the conditional vendor is not required to file a creditor's claim, or take any affirmative action with respect to his property unless he desires to reclaim possession of his property during the bankruptcy proceedings.

In re Lake's Laundry, 11 F. Supp. 237, 238;

In re Lake's Laundry, 79 F. (2d) 326, 327-328, 101 A. L. R. 247, certiorari denied in 296 U. S. 622, 80 L. Ed. 422, 56 S. Ct. 144;

In re Burgemeister Brewing Co., 84 F. (2d) 388, 389, reversing 11 F. Supp. 902;

In re White Plains Ice Service, 109 F. (2d) 913;

In re Ideal Laundry, 10 F. Supp. 719-720;

In re Weiss, 10 F. Supp. 227, 229.

The foregoing cases point the fallacy of petitioner's argument that under the final decree the claims of all creditors and stockholders, both those who had, and who had not, filed their claims, were barred from thereafter asserting any claim against the debtor or its property (Pet. 59-60). Respondents have never filed a claim against debtor of any kind or character based on the balance due under said conditional sale contract. The real property was not the property of debtor under the law of California. Respondents' title to the real property was not, and could not be, affected by said final decree or any action of the bankruptcy court. As was said by the United States District Court in and for the Northern District of California, Southern Division, in the apposite case of *In re Ideal Laundry,* supra:

> "It follows, therefore, that the property in question is that of petitioner; it remains the owner, and as such it cannot without its consent be deprived of its property. *It is not a creditor; but it is, under the law of California, the absolute owner of the property under an express reservation of title. Consequently, the provisions of the Bankruptcy Act applicable to creditors are not pertinent, but the rights of petitioner are to be determined by the principles of law governing the rights of owners of property.* The court cannot, therefore, deal with petitioner's property in such manner as to deprive it of the same, and there must be an order granting the petition and permitting petitioner to reclaim its property."

No court has power by the mere force of a decree to annul a deed or establish a title.

> *Hart v. Sansom,* 110 U. S. 151, 155, 28 L. Ed. 101, 103, 3 S. Ct. 586;

Carpenter v. Strange, 141 U. S. 87, 105, 35 L. Ed. 640, 647, 11 S. Ct. 960, 966;

Fall v. Eastin, 215 U. S. 1, 10, 54 L. Ed. 65, 70, 30 S. Ct. 3;

Taylor v. Taylor, 192 Cal. 71, 218 Pac. 756, 51 A. L. R. 1074.

Due process of law "inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Ochoa v. Hernandez, 230 U. S. 139, 141, 33 S. Ct. 1033, 1041, 57 L. Ed. 1427, 1428;

Ginsberg v. Lindel, 107 F. (2d) 721, 726 (C. C. A. 8);

Regoli v. Fancher, 1 Cal. (2d) 276, 34 Pac. (2d) 477;

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

In *Haggert v. Dewey,* 77 Ark. 527, 92 S. W. 792, 793, 7 Ann. Cas. 333, 334, the court said:

> "A conveyance of land executed by a stranger to the title, or the judgment of a court rendered in a suit between strangers to the title, cannot affect the true owner, and casts no cloud upon title of the true owner. It is not an 'apparent title', nor does it prima facie create a right which the true owner, or even an occupant without title, of land must bring forward evidence to rebut. (Citing cases.) . . .
>
> The same can be said of a decree rendered in a suit between strangers to the title. At most, such a decree serves only to adjudicate the title between these two, or to pass whatever title one may have to the other. It does not cloud the title of the true owner."

A judgment is not *res judicata* as to one not a party to the suit.

United States of America v. Pink, ___ U. S. ___, 86 L. Ed. 459 (advance opinion);

Stone v. Farmers Bank, 174 U. S. 409, 43 L. Ed. 1027, 19 S. Ct. 880.

In *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 62 L. Ed. 1215, 38 S. Ct. 566, a state court had held that the defendant was bound by a judgment to which it was neither party nor privy. Reversing this decision this court said (247 U. S. at p. 476):

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had the opportunity to litigate the same matter in a former action in a court of competent jurisdiction. (Citing authorities.) The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. (Citing authorities.) And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (citing authorities), *so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*
>
> It follows that in this case res judicata cannot be regarded as an adequate support for the judgment.
>
> . . .
>
> Judgment reversed. . . ."

(b) Counsel for respondents did not enter a general appearance by virtue of a single statement made at a hearing on the plan of reorganization.

Petitioner claims (Petition pp. 49-54) that respondents entered a general appearance in the bankruptcy proceedings because at a hearing held on the fairness and feasability of the plan of reorganization, after the close of testimony relating thereto, Mr. DeGroat, the attorney for the executors "announced in open court in said District Court of the United States that the executors have only a bare equity, possibly, in the redemption of the Whiteside notes and expressed approval of the plan of reorganization" (R. 175). This violent effort to make a person a party to a proceeding because of an informal remark made by counsel who was present, not as a participant in the proceedings but merely as an interested spectator, is on a par with the equally untenable position taken by counsel in the State Courts that the executory contract for the sale of the land was a deed. If this were to be held to constitute an appearance, any spectator might by some artifice or artful question be caused to make some statement about the proceedings with a consequent claim that he had made a general appearance and was a party. Other than the bare stipulation that the remark was made, the record is silent as to the circumstances attending the making thereof.

Counsel for petitioner neglects to consider that the intention of a person in making a statement or doing some act is what is determinative of the question as to whether there has been an appearance and a submission to the court's jurisdiction. It is respectfully submitted that the record fails to show any such intention on the part of

Mr. DeGroat to submit his clients to the jurisdiction of the court. The record fails to show any participation in the proceedings of the court, the filing of any claim or other paper with the court, or request for any relief. Presumably the statement was made at the invitation of the court or some party to the proceedings. Respondents herein were not creditors, stockholders, or bondholders of the debtor, and had no right to intervene or be made parties to the proceeding. When respondents did wish to invoke the jurisdiction of the court, it was necessary for them to ask leave to file a petition in intervention in the customary manner (R. 310). This petition was later dismissed without prejudice by the court, a fact to which we will advert later.

An appearance is not to be inferred except as a result of *unequivocal acts* from which an intent to do so may properly be inferred.

Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139;

Altpeter v. Postal Telegraph-Cable Co., 26 Cal. App. 705, 148 Pac. 241;

Dahlgren v. Pierce, 263 F. 841 (C. C. A. 6);

Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (C.C.A. 6);

Citizens Savings & Trust Co. v. Illinois Central R. Co., 205 U. S. 45, 51 L. Ed. 703, 27 S. Ct. 425.

(c) Respondents did not become parties to the bankruptcy proceeding by filing an intervening petition which was dismissed without prejudice.

We have heretofore set forth at length the facts concerning the filing of this intervening petition and the dis-

missal thereof without prejudice (Respondents' Reply To Petition, pp. 15-17). It will not be necessary to repeat those facts here. The intervening petition, the preliminary order made thereon, and the order dismissing the petition without prejudice appear in the record at pages 310, 326, and 332 respectively. That portion of the opinion of the District Court of Appeal relating to petitioner's claim of *res judicata* and the question as to whether respondents herein became parties to the bankruptcy proceedings so as to be bound by anything contained in the final decree appears at pages 444 to 446 of the record.

Petitioner's principal contention (Pet. 53) is that since the record shows that counsel for both parties stipulated that the order dismissing the intervening petition and the final decree were entered simultaneously (R. 180), therefore respondents were parties when the final decree was entered and are therefore bound by that decree.

This stipulation may not be construed to mean that Judge Reeves held a pen in each hand and affixed each letter of his name to each of these documents at the exact instant.

Nor may petitioner successfully make the unfair contention that because it was stipulated both the order dismissing the intervening petition without prejudice and the final decree were entered simultaneously, respondents were thus parties when the final decree was entered as they do on page 53 of Petitioner's Brief. Such hairsplitting is unthinkable before this august Court. With as much profit we might consider which came first, the chicken or the egg.

If the order and the decree could in fact be made absolutely simultaneously, it might well be contended that respondents ceased to be parties at the moment the decree was entered. They were out of the case at the same time the decree was entered.

However, the application of a little common sense to the situation would seem to be more in order than the uncommon shrewdness and metaphysical exposition manifested in Petitioner's Brief.

One must assume that before concluding the bankruptcy proceeding, the bankruptcy court would first decide any intervention proceeding or ancillary matters, particularly since contrary action might jeopardize the jurisdiction of the court to act at all.

May we further suggest that in a reorganization proceeding the final decree is the order by which the court closes the case. Previously thereto, the court must make all orders which are necessary to dispose of matters pending. Paragraph (h) of Section 77B of the Bankruptcy Act provides:

> "*Upon the termination of the proceedings a final decree shall be entered* discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, *and closing the case.*"

The final decree is the last act within the court's jurisdiction of the proceedings. The final decree itself concluded with the declaration that the bankruptcy proceedings of Pickering Lumber Company "*be and the same are hereby finally and completely terminated and closed.*" Although both the order of dismissal without prejudice

and the final decree were dated the same day, it is an elementary rule of law that it will be presumed that legal instruments bearing the same date will have operation in such order of priority as will effect the obvious results intended within the jurisdiction of the court making the orders.

But the conclusive answer to this whole hairsplitting and irrelevant proposition is already contained in the opinion of the District Court of Appeal where it was pointed out what matters were involved in the petition, and that the order provided that:

> "Except as above provided, said intervention petition be, and it hereby is, dismissed, without prejudice, however, to the rights of said interveners and said respondents with respect to the matters and things alleged in said intervening petition."

In view of this language with what degree of sincerity can it be contended that the final decree and order of dismissal are to be considered as one adjudication of the matters contained in the petition in intervention? Why should a court go through the idle ceremony of dismissing the petition without prejudice if it had already decided the matters referred to in the petition?

It is respectfully submitted that the District Court of Appeal has fairly and accurately stated the facts respecting this contention, and, with a full understanding thereof, has correctly decided that the decree of the bankruptcy court is not *res adjudicata* in this action.

The California District Court of Appeal is not the only court to hold that nothing was adjudicated by the

bankruptcy court and that the final decree entered by it was not *res judicata*. In *First and American National Bank of Duluth v. Whiteside, et al.*, 207 Minn. 537, 292 N. W. 770, the Duluth Bank brought an action against respondents herein to foreclose the stocks and bonds received by it from petitioner herein under the final decree entered in the bankruptcy proceedings. There the Duluth Bank claimed that the final decree in the bankruptcy proceedings of Pickering Lumber Company was *res judicata* and binding on the Whiteside Estate just as petitioner makes the same claim here. The making of the identical claim by petitioner here and the Duluth Bank in the Minnesota courts bespeaks a continuation of their joint effort to despoil the Whiteside Estate. The Supreme Court of Minnesota denied the claim, saying:

> "First we deny plaintiff's claim that the determinative issue is res judicata. The federal court intended to act only to the extent necessary to effect reorganization of the Pickering Company. True, the final decree in reorganization stated that the securities were to be held by plaintiff 'in lieu of the collateral' under the bank's agreement with Whiteside. But the intention was merely to effect the exchange between the bank and the Pickering Company. To hold that it adjudicated rights between the bank and the Whiteside estate would ignore the fact that the latter's complaint in intervention had been dismissed without prejudice because the courts of Minnesota were considered the proper forum for decision of the indicated and reserved questions."

If the final decree was not *res judicata* as to the Whiteside Estate based on the intervention of respondents herein where that intervention made the Duluth Bank

and Whiteside noteholders adverse parties, with what degree of plausibility or sincerity may petitioner herein claim *res judicata* when no claim against the estate of the debtor was asserted by the Whiteside executors.

In addition to the requirement of identity of parties, it is well settled that the principle of *res judicata* is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance, or only to be inferred by arguing from the decree.

North Carolina Railroad Co. v. Story, 268 U. S. 288, 294, 69 L. Ed. 959, 45 S. Ct. 531;

Title Guarantee & Trust Co. v. Monson, 11 Cal. (2d) 621, 632, 81 Pac. (2d) 944, 950;

Beronio v. Ventura Lumber Co., 129 Cal. 232, 236, 61 Pac. 958;

Watson v. Poore, 18 Cal. (2d) 302, 309-310, 115 Pac. (2d) 478.

In *Brunswick Tire Corp. v. Credit Tire Stores Inc.,* 8 Cal. App. (2d) 69, 46 Pac. (2d) 804, the appellant contended that the decision of an Arizona court dismissing an action "without prejudice" was *res judicata* in the subsequent action. Affirming the judgment in the subsequent action *on motion,* the court laconically stated (8 Cal. App. (2d) at p. 70):

> "The record before us shows that the case in Arizona was dismissed 'without prejudice'. There is no merit in this appeal."

The only adjudication by a dismissal without prejudice is that nothing is adjudged.

Fleishbein v. Western Auto Supply Agency, 19 Cal. App. (2d) 424, 427, 65 Pac. (2d) 928, 929;

Harrison v. Remington Paper Co., 140 F. 385, 399, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314;

Krauthoff v. Kansas City Joint Stock Land Bank, 31 F. (2d) 75, 77 (C. C. A. 8).

In the case of a dismissal without prejudice, such judgment is not on the merits and is not a bar to a subsequent action. Such a dismissal without prejudice determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced.

Fidelity & Deposit Co. of Maryland v. Port of Seattle, 106 F. (2d) 777, 781 (C. C. A. 9);

Petri v. Manny, 99 Wash. 601, 170 Pac. 127, 128, 1 A. L. R. 1595.

A trial upon which nothing was determined cannot support a plea of *res judicata,* or have any weight as evidence at another trial.

Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. Ed. 878, 880, 3 S. Ct. 99;

Gardner v. Michigan Central R. Co., 150 U. S. 349, 356, 37 L. Ed. 1107, 1109, 14 S. Ct. 140;

Snare & Triest Co. v. Friedman, 169 Fed. 1, 40 L. R. A. (N. S.) 367, 374;

Harna-Smith Co. v. School District of Scranton, 44 F. Supp. 860, 863;

Lynch v. Lynch, 124 Cal. App. 454, 462, 12 Pac. (2d) 741.

The cases cited on page 50 by petitioner to their proposition that by attempted intervention of respondents they became parties to the proceedings for all purposes are not in point.

Typical of those cases is *Alexander & Hillman,* where the court held that by appearing in a federal receivership proceeding in a state other than his residence, and presenting and proving his claim to share in the distribution of the assets of the corporation, a corporate officer or director submits himself to the jurisdiction of the receivership court for the adjudication of his liability on account of corporate assets fraudulently obtained and wrongfully withheld by him, under an ancillary bill filed by the receivers setting up such liability as a counterclaim against him, without the service of process.

In the case at bar respondents made no claim against the debtor or any of its property or assets, asserted no right against debtor, and after being permitted to file an intervening petition against the Duluth Bank and Whiteside Noteholders Committee, they were dismissed without prejudice. The facts are entirely different.

French v. Gapen is likewise not applicable to the situation presented here where respondents were dismissed without prejudice. The case is, however, definitely authority for respondent's contention that no title to the property in question passed by virtue of any decree or order made in the bankruptcy proceedings, and that the court did not and could not adjudicate title against respondents, since they were not parties. Sketching the facts rapidly: The State of Indiana built a canal and granted certain property rights and easements affecting the property to several persons. It then passed title to the property to trustees who were given the power to sell the canals. Gapen, a stockholder, brought suit against

the trustees to have the venture liquidated and the proceeds distributed to him and other canal stockholders. The persons having property rights in the canals were not made parties, but filed intervening petitions setting up their property rights after a sale had been made and confirmed, but before the proceeds had been distributed. The petitions were dismissed, after demurrers sustained. The decrees dismissing the petitions were reversed, this court saying:

> "It only remains to consider whether the petitioners are entitled to relief in this suit and under the form of proceeding they have adopted.
>
> They were not originally parties to the suit. *No sale of the trust property could be made in their absence which would dispose of their rights.* All that could pass under such a sale would be that which was conveyed by the State to the Trustees, to-wit: the canal, etc., subject to the prior rights of the petitioners. *No decree binding on the petitioners could be rendered, defining what their rights actually were.* A purchaser would take only what the Trustees held, and be left to settle with the petitioners as best he could.
>
> But while the petitioners were not, in fact, parties, they might with propriety have been made such, and there cannot be a doubt that if they had intervened before the decree of sale, and asked to be made defendants, it would have been within the power of the court, with the consent of the complainants, to take them in. The case did go on without them, presumably because it nowhere appeared until their intervention that there were any such outstanding rights as they claim."

The remaining cases cited by petitioner in connection with its claim that by the attempted intervention of respondents they became parties to the proceedings for all purposes do not involve the facts presented here where both interveners and respondents were dismissed without prejudice. *When a petition in intervention is dismissed without prejudice, the intervener is in the same position as if he had never intervened.* The situation is the same as if he had applied for leave to intervene and leave to intervene had been denied. Here, by the dismissal without prejudice, all rights of both interveners and respondents therein were reserved.

A dismissal of a petition in intervention filed in a bankruptcy proceeding under Section 77B of the Bankruptcy Act, after leave given to intervene, is a denial of the right to intervene and participate as parties, and an attempted appeal from the final decree by the attempted interveners will likewise be dismissed.

In re Kenmore-Granville Hotel Co., 92 F. (2d) 778 (C. C. A. 7), certiorari denied in 302 U. S. 767, 82 L. Ed. 596, 58 S. Ct. 481.

From the foregoing facts and cases it is very clear that respondents herein were not parties to the bankruptcy proceedings, and hence nothing decided therein is binding upon them. The plea of *res judicata* is sham.

Due process of law "inhibits the taking of one man's property and giving it to another, contrary to settled usage and modes of procedure, and without notice or an opportunity for a hearing".

Ochoa v. Hernandez, 230 U. S. 139, 141, 57 L. Ed. 1427, 1428, 33 S. Ct. 1033, 1041;

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565;
Ginsberg v. Lindel, 107 F. (2d) 721, 726 (C. C. A. 8);
Regoli v. Fancher, 1 Cal. (2d) 276, 34 Pac. (2d) 477.

Nothing short of notice and hearing is due process and due process is required in a bankruptcy court as well as in a court of general jurisdiction.

Coates v. Maguire Oil & Refining Corp., 47 Cal. App. (2d) 275, 279, 117 Pac. (2d) 898.
Henderson v. American Service Co., 35 F. Supp. 732.

The District Court of Appeal decided this cause upon two propositions of law, first, that the contract of sale of 1927 was not a deed, and, second, that the deed which had been put in escrow at the time the contract was entered into had been delivered in violation of the terms of the escrow agreement. Determination of the legal effect of the contract and decision as to whether a deed delivered by an escrowee contrary to the terms of the escrow agreement required the application of the local law of California. The fact that the escrowee acted upon the order of a bankruptcy court did not make the question of the validity of the delivery a federal question in that the final decree does not purport to adjudge that the title of the Whiteside Estate was thereby vested in the reorganized corporation; nor otherwise a determination of the title. The decision of the state court does not purport to decide whether the federal court had power to order the Duluth Bank to make the delivery, but only de-

cides what effect under the circumstances the delivery had upon the title to the land under California law.

Promis v. Duke, 208 Cal. 420, 281 Pac. 613;

Regoli v. Fancher, 1 Cal. (2d) 276, 34 Pac. (2d) 477.

CONCLUSION.

In conclusion it is respectfully submitted that the Petition for Writ of Certiorari should be denied for each and all of the reasons hereinbefore set forth.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. (Supreme Court Rules, Rule 38 (5).) It is apparent from the facts of this case, and the law declared in the opinion of the District Court of Appeal of the State of California, that the decision is based upon the law of California relating to real property located in that State, and that no substantial Federal question has been necessarily decided by the State Court in a way not in accord with the decisions of this Honorable Court.

The decision sought to be reviewed is correct in law, and is fair and equitable to all parties concerned. The final paragraph thereof reads as follows:

> "The judgment is reversed with directions that a judgment be entered adjudging defendants to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes, and subject, further to the terms and conditions of the contract of purchase of January 5, 1927."

Respondents were entitled to nothing less than that which was granted them by the judgment. Petitioner was entitled to nothing more.

Dated, San Francisco, California,
January 29, 1943.

Respectfully submitted,
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